



October 9, 2000

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2000-3870

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140260 & 141039.

The Texas Department of Human Services (the "department") received several written requests for records pertaining to the department's planned implementation of the Texas Integrated Eligibility Redesign System ("TIERS"). Specifically, most of the records requests encompass the following documents: all proposals submitted to the department in connection with the RFOs for the Independent Verification and Validation project (the "IV&V"), the winning proposal for the "Phase 0" of TIERS, the scoring sheets and scoring criteria used in the review process of all vendor proposals in response to the Phase 0 and IV&V projects, and the winning proposal for Policy Integration work.

You do not contend that any of the documents related to Phase 0, IV&V, and Policy Integration are excepted from required public disclosure. Rather, you have requested a decision from this office pursuant to section 552.305 of the Government Code, which authorizes parties with a privacy or proprietary interest in the requested information to submit arguments to this office as to why the information is excepted from required public disclosure.¹ In accordance with section 552.305(d), the department notified representatives of American Management Systems ("AMS"), Science Applications International

¹Because you do not argue that the requested scoring sheets and scoring criteria used in the review process are excepted from public disclosure, we assume the department has released these documents to the requestor. If it has not, it must do so at this time. See Gov't Code § 552.302.

Corporation ("SAIC"), Consultec, Inc. ("Consultec"), Lockheed Martin ("Lockheed"), Hitachi Data Systems Corporation ("Hitachi"), Renaissance Government Solutions, Incorporated ("Renaissance"), and the Gartner Group ("Gartner") of the current records request and invited them to submit comments to this office as to why their information is excepted from public disclosure.

This office did not receive any comments from SAIC, Consultec, Lockheed, Hitachi, Renaissance, or Gartner in response to your notice. See Gov't Code § 552.305(d)(2)(B); Open Records Decision No. 552 (1990).² Consequently, this office has no basis on which to conclude that any portion of these companies' proposals is excepted from required public disclosure under the Public Information Act. Accordingly, we conclude that the department must release these companies' proposals to the requestor in their entirety.

On the other hand, AMS has submitted comments to our office, and contends that portions of its proposals for the Phase 0 and IV&V projects are excepted from public disclosure. One of AMS' contentions is that the identified portions of its proposals are made confidential in accordance with its contract with the department. It is well established, however, that information is not confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any contract between the department and AMS specifying otherwise.

AMS contends that portions of its proposal are excepted from public disclosure pursuant to section 552.104 of the Government Code, which protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 was not intended to protect business entities that are in competition in the private sector. The primary purpose of section 552.104 is to protect the *government's* purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders.³ Consequently, the AMS proposal is not excepted from public disclosure under section 552.104.

AMS also contends that portions of its proposal are excepted from public disclosure under section 552.110 of the Government Code, which protects the property interests of private

²You inform us that SAIC and Consultec have objected to the release of staff members' names and resume information. However, as noted, neither company briefed this office or raised any recognized exception to required public disclosure for this information.

³We also note that section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978).

persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. AMS contends that both branches of section 552.110 apply to portions of its proposals.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). In this instance, although AMS contends that specific portions of its proposals constitute trade secret information, it has not demonstrated how any of the six factors apply to the information at issue. We conclude, therefore, that AMS has not established a *prima facie* case for trade secret protection.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). AMS has made no such demonstration to this office. Accordingly, we conclude that the department must release the AMS proposals to the requestor in their entirety.

Finally, we address your arguments for withholding information pertaining to a pending RFO. One of the requestors has sought the "Planning Advanced Planning Document" and the "Implementation Advanced Planning Document" for the Phase 1 of TIERS. You explain that these two documents "consist[] of strategic planning and financial documents that [the] department had to prepare and provide to [the] federal government to secure federal financial

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

participation for the TIERS project.” You contend these documents are excepted from public disclosure under section 552.104 of the Government Code.

As noted above, section 552.104 of the Government Code protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals and other related information prior to the award of a contract. You state that the RFO for Phase 1 of the TIERS project is still pending, and you have explained to this office why the release of these documents at this time would interfere with the current RFO process. Assuming the department has not made these documents available to the proposers in the current RFO, we conclude that the department may withhold these documents at this time pursuant to section 552.104 of the Government Code. Please note, however, that section 552.104 will not except these documents from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978). Nor will section 552.104 continue to apply in the event no contract is awarded. Open Records Decision No. 201 (1978).

In summary, the department may withhold pursuant to section 552.104 of the Government Code the requested “Planning Advanced Planning Document” and the “Implementation Advanced Planning Document” for the Phase 1 of TIERS. The requested proposals for the Phase 0, IV&V, and Policy Integration work must be released to the requestor in their entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/RWP/ljp

Ref: ID# 140260

Encl. Submitted documents

cc: Ms. Crystal C. Kuhs
Strategic Partnerships Inc.
111 Congress Avenue, Suite 1200
Austin, Texas 78701
(w/o enclosures)

Ms. Beth Elliot
Contracts Manager
American Management Systems
12601 Fair Lakes Circle
Fairfax, Virginia 22033
(w/o enclosures)

Ms. Betty J. Muzio
Science Applications International Corporation
4242 Woodcock Drive, Suite 150
San Antonio, Texas 78228-1253
(w/o enclosures)

Ms. Kathy Sill
Manager, External Services
Logicon, Inc.
9314 West Jefferson
Dallas, Texas 75211-9302
(w/o enclosures)

Mr. Gray J. Arnold, President
Consultec, Inc.
9040 Roswell Road, Suite 700
Atlanta, Georgia 30350
(w/o enclosures)

Mr. Kevin Dorney
Executive Vice President
MAXIMUS
800 South Street, Suite 460
Waltham, Massachusetts 02453

Mr. Michael T. Perry
Director Integrated Solutions
Hitachi Data Systems Corp.
15303 Dallas Parkway, Suite 110
Addison, Texas 75001-6402
(w/o enclosures)

Mr. Michael Barbee, Vice President
Lockheed Martin
P.O. Box 8048
Philadelphia, Pennsylvania 19101
(w/o enclosures)

Mr. Charles Cain
Senior Vice President
Renaissance Government Solutions, Inc.
1717 W. 6th Street, Suite 340
Austin, Texas 78703
(w/o enclosures)

Mr. William P. Kumagai
Gartner Group
5950 Canoga Avenue, Suite 600
Woodland Hills, California 91367
(w/o enclosures)

Mr. Ken Harrell
IBM Government Solutions
400 W. 15th Street, Suite 1200
Austin, Texas 78701
(w/o enclosures)